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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 (SAN FRANCISCO DIVISION)

17 FINJAN LLC,

Case No. 3:14-cv-04908-RS

18 Plaintiff,

**FINJAN LLC'S OPPOSITION TO PALO
ALTO NETWORKS, INC.'S MOTION
FOR SUMMARY JUDGMENT**

19 v.
20 PALO ALTO NETWORKS, INC.,

Date: November 14, 2024
Time: 1:30 P.M.
Hon. Richard Seeborg
Ctrm. 3, 17th Floor

21 Defendant.

22
23 **REDACTED**

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF ISSUES TO BE DECIDED

PAN raises numerous contested factual disputes as part of its omnibus Motion for Summary Judgment (“Motion”). For the ’408 Patent, whether the accused products instantiate programming language specific scanners, whether the accused products instantiate programming language specific scanners after determining the programming language of incoming content, and whether WildFire determines the programming language of content. For the ’633 Patent, whether WildFire is a user device. For the ’731 Patent, whether the accused products store scan results temporarily, whether temporarily storing scan results in a database satisfies the claims, whether AV signatures contain a list of computer commands, and whether DOE opinions preclude summary judgment.

But to prevail, a movant must show that “there is no genuine dispute as to any material fact and [that it] is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a) “[T]he district court must view the evidence in a light most favorable to the nonmovant and draw all reasonable inferences in its favor” *SRI Int’l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985) (en banc). Here, PAN’s Motion requires the court to resolve genuine factual disputes about how multiple limitations of the asserted claims of all three asserted patents apply to two different accused products. The Court should thus deny PAN’s Motion.

II. ARGUMENT¹

A. A Genuine Dispute of Material Fact Exists as to Whether PAN's Accused Products Infringe the Asserted Claims of the '408 Patent

Each of PAN’s arguments for summary judgment suffers from the same flaw: they ask the court to resolve the factual issue of whether a skilled artisan would conclude that the accused products meet the contested claim limitations, as construed by the Court. But that is a classic fact question for the jury. The “determination as to whether the claims, properly construed, read on the accused device is a question of fact,” *Power Mosfet Techs., L.L.C. v. Siemens AG*, 378 F.3d 1396, 1406 (Fed. Cir. 2004). This is especially true where, as here, these factual questions are fiercely

¹ Because PAN moves for summary judgment on at least four distinct issues across three asserted patents, Finjan does not provide a single statement of the relevant facts; rather, it identifies and discusses the relevant facts for each issue in the issue-specific argument subsection below.

1 disputed and, in some instances, PAN's expert does not rebut the opinions of Finjan's expert.

2 **1. Fact Disputes Exist Regarding Whether NGFW and WildFire
3 "Instantiate a Scanner for the Specific Programming Language"**

4 PAN's Motion fails to establish that the accused products do not practice the limitation
5 "instantiating, by the computer, a scanner for the specific programming language." The record
6 evidence demonstrates PAN's products do perform such an instantiation.

7 For NGFW, Dr. Min opined that "PAN's NGFW includes a scanner (e.g., [REDACTED]

8 [REDACTED]
9 [REDACTED]) that is used as part of PAN's single pass
10 architecture to satisfy this limitation." Ex. A (Min Op. Rpt.) ¶ 353. Dr. Min then corroborated this
11 opinion with a thorough analysis of evidence, including source code, technical documents, and
12 deposition testimony. *See, e.g., id.* ¶¶ 385-392 (discussing NGFW source code showing
13 programming language specific scanners); ¶¶ 353-383 (discussing NGFW technical documents
14 supporting his opinions that NGFWs have programming language specific scanners). As just one
15 example, Dr. Min cites source code demonstrating NGFW instantiates a scanner for the specific
16 programming language that was previously determined. In this example, NGFW instantiates a
17 scanner specific to HTML and other scanners specific to other programming languages, such as
18 PowerShell, JavaScript and Visual Basic:

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 Ex. A (Min Op. Rpt.) ¶ 387 (emphasis added); *see also id.* ¶¶ 389-411 (discussing additional source
25 code showing programming language specific scanners); ¶¶ 353-383 (discussing NGFW technical
26 documents supporting his opinions). Each of these programming languages that PAN's NGFW
27 instantiates specific scanners (e.g., [REDACTED] [REDACTED]
28 [REDACTED]) for are also programming languages explicitly identified in the '408 Patent.

1 Dr. Min similarly explains how WildFire instantiates a scanner for a specific programming
 2 language that was previously determined.

3 [REDACTED]
 4
 5
 6 Ex. A (Min Op. Rpt.) ¶ 424.

7 Dr. Min likewise cites source code from WildFire that includes programming language
 8 specific scanning:

9 [REDACTED]
 10
 11
 12 *Id.* ¶ 426.

13 [REDACTED]
 14
 15
 16 *Id.* ¶ 427; *see also id.* ¶ 425 (identifying language specific scanners, such as [REDACTED]);
 17 ¶¶ 412-422 (discussing Wildfire technical documents evidencing infringement); ¶¶ 429-452
 18 (discussing relevant WildFire source code with language specific scanners); *see also* Ex. B (Min
 19 Dep. Tr. Vol. II) at 523:8-18. None of the testimony PAN cites is inconsistent with these opinions.

20 PAN’s Motion does not mention its source code that shows PAN’s accused products have
 21 programming language specific scanners—much less explain why summary judgment of
 22 noninfringement is appropriate despite it or the other evidence cited throughout Dr. Min’s report.
 23 Instead, PAN tries to create its own “evidence” of noninfringement. PAN’s arguments are wrong
 24 and legally irrelevant.

25 First, PAN’s “evidence” hardly demonstrates the lack of a dispute of material fact and
 26 instead shows a disagreement between experts. PAN cites two exhibits PAN’s counsel asked
 27 Dr. Min to make during his deposition. Neither was intended to illustrate the type of detail needed
 28 to evaluate whether PAN’s product satisfies this limitation. Rather, PAN’s counsel selected high-

1 level documents as a starting point and asked Dr. Min to annotate the documents to identify the
 2 accused “scanner.” The high-level diagrams did not illustrate all necessary details (such as the sub-
 3 components/modules Dr. Min identifies as the “scanner”), so Dr. Min annotated as best he could.
 4 But he never opined that the diagrams illustrated all components of the scanner.

5 Starting with NGFW, PAN cites Exhibit 38 from Dr. Min’s deposition, which is a document
 6 with an incomplete illustration of the [REDACTED], which PAN asked Dr. Min to annotate at his
 7 deposition. As explained by Dr. Min at his deposition, Exhibit 38 is not the same document he cited
 8 in his report to describe the infringing scanners. Ex. B (Min Dep. Tr. Vol. II) at 489:2-490:18. The
 9 figure from Exhibit 38 Dr. Min was asked about was cited in his report to provide a high-level
 10 depiction of other aspects of the [REDACTED] performing the steps of the decoding, scanning, and
 11 threat detection. Ex. A (Min Op. Rpt.) ¶377. Dr. Min did not cite this figure to identify scanners in
 12 NGFW. Instead, he cited a different document describing the components (e.g., [REDACTED]
 13 [REDACTED]) of the [REDACTED]. See, e.g., id. ¶ 364. When asked to identify a scanner in Exhibit 38
 14 anyway, Dr. Min identified relevant components of the scanner depicted in the diagram and added
 15 by hand additional features (e.g., APP-ID) not illustrated in the document. Ex. B (Min Dep. Tr. Vol.
 16 II) at 493:21-494:21. Dr. Min did not identify this markup of a high level diagram as a substitute for
 17 the more detailed opinions he provided in his report regarding the accused scanner. Ex. B (Min Dep.
 18 Tr. Vol. II) at 492:2-11 (testifying that the diagram only depicted part of the claimed scanner); see
 19 also Ex. A (Min Op. Rpt.) ¶¶ 347-383. PAN now cites Exhibit 38 as evidence that there is only a
 20 single scanner, when all it demonstrates is Dr. Min’s best attempt to identify from among the high
 21 level key [REDACTED] components those comprising a scanner.

22 PAN’s “evidence” in support of its argument for Wildfire fares no better. There, PAN cites
 23 a “workflow” document, which does not in fact illustrate components of Wildfire. When asked to
 24 annotate it, Dr. Min noted it did not illustrate all relevant functionality, such as [REDACTED].
 25 Ex. B (Min Dep. Tr. Vol. II) at 518:2-4. And when asked to explain the diagram, Dr. Min confirmed
 26 that, consistent with his source code analysis, the items annotated in the workflow illustrated
 27 multiple scanners:

28 [REDACTED]

1
2
3
4
5 Ex. B (Min Dep. Tr. Vol. II) at 523:8-18 (testifying that WildFire has multiple scanners).

6 Even if PAN’s “evidence” is to be credited (it should not), “[t]his is a classic example of
7 dueling expert testimony that precludes summary judgment.” *Tevra Brands LLC v. Bayer*
8 *HealthCare LLC*, No. 19-cv-04312-BLF, 2024 WL 1909156, at *10 (N.D. Cal. May 1, 2024). The
9 jury, not the Court, should weigh the credibility of the experts and decide the winner of this “battle
10 of experts.” *See Edwards Sys. Tech., Inc. v. Digital Control Sys., Inc.*, 99 Fed. Appx. 911, 921–22
11 (Fed. Cir. 2004) (unpublished) (“[T]here seems to be a classic ‘battle of the experts’ which renders
12 summary judgment improper.”). Thus, granting summary judgment would be improper.

13 Second, even if there were no fact disputes on whether the accused products include a single
14 scanner—which there are given the unrebutted testimony and analysis of Dr. Min—PAN’s products
15 would still infringe. The plain language of the claim, in the context of the specification, does not
16 prohibit a single scanner from scanning multiple programming languages. *See Thorner v. Sony*
17 *Computer Ent. Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012).

18 In fact, the ’408 Patent’s specification explicitly discloses embodiments with a single
19 scanner (*i.e.*, an adaptive rule-based scanner) that is capable of scanning all types of programming
20 languages by instantiating different modules to handle each programming language:

21 ***An ARB scanner is able to adapt itself dynamically to scan a specific type of***
22 ***content***, such as inter alia JavaScript, VBScript, URI, URL and HTML. ARB
23 scanners differ from **prior art scanners that are hard-coded for one particular**
type of content. In distinction, ***ARB scanners are data-driven, and can be enabled***
to scan any specific type of content by providing appropriate rule files, without the
24 need to modify source code.

25 Dkt. 112-6 (’408 Patent) at 1:66–2:6 (emphasis added).

26 Reference is now made to FIG. 2, which is a simplified block diagram of an adaptive
27 rule-based content scanner system 200, in accordance with a preferred embodiment
28 of the present invention. ***An ARB scanner system is preferably designed as a generic***
architecture that is language-independent, and is customized for a specific
language through use of a set of language-specific rules. Thus, ***a scanner system***

is customized for JavaScript by means of a set of JavaScript rules, and is customized for HTML by means of a set of HTML rules. In this way, each set of rules acts as an adaptor, to adapt the scanner system to a specific language.

Id. at 6:14–24 (emphasis added); *see also id.* at 15:31–32 (“ARB scanner factory module 630 instantiates a scanner repository 640.”); Figs. 6–7 (depicting an ARB scanner with modules for scanning HTML, Javascript, and URI). As such, PAN’s interpretation contradicts the specification. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (explaining that “claims must be read in view of the specification”); *Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings*, 370 F.3d 1354, 1360 (Fed. Cir. 2004) (“In most cases, the best source for discerning the proper context of claim terms is the patent specification wherein the patent applicant describes the invention.”); *see also C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 865 (Fed. Cir. 2004) (explaining that “a construction that excludes a preferred embodiment is rarely, if ever, correct.”) (internal quotations omitted).

2. The Accused Products Determine a Programming Language Before Instantiating a Scanner for the Specific Programming Language

PAN incorrectly asserts “the experts agree NGFW does not determine a programming language *before* instantiating any ‘scanner.’” Mot. at 10; *see also id.* at 12-13 (making the same noninfringement argument for WildFire). In fact, Dr. Min offered detailed analysis explaining how the accused products determine a programming language *before* instantiating a programming language specific scanner, which PAN does not address. PAN alleges there is no dispute of material fact but fails to address the actual evidence (such as the source code analysis) relied upon by Dr. Min.

Specifically, Dr. Min cites source code demonstrating PAN’s NGFW determines a programming language (source code identified in red) and instantiate a scanner “afterwards” (source code identified in blue).

1 [REDACTED]
2
3
4
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6
7 Ex. A (Min Op. Rpt.) ¶ 387; *see also id.* ¶ 385 (providing additional opinions regarding source code
8 showing instantiating a scanner in response to determining a programming language) ¶¶ 353-383
9 (evidencing this operation through NGFW technical documents).

10 Dr. Min similarly identified WildFire source code demonstrating the determining of a
11 programming language and instantiating of a scanner, and confirmed it works the same as NGFW:
12 [REDACTED]
13
14
15

16 *Id.* ¶ 426.
17 [REDACTED]
18
19
20

21 *Id.* ¶ 427; *see also id.* ¶¶ 424-425 (discussing WildFire source code with language specific scanners
22 that are instantiated in response to determining the programming language); 429-452 (discussing
23 relevant WildFire source code showing instantiating language specific scanners based on the
determined programming language); ¶¶ 412-422 (discussing Wildfire technical documents); Ex. B
24 (Min Dep. Tr. Vol. II) at 595:2-24 (confirming that WildFire operates similar to NGFW).
25

26 Thus, Dr. Min identifies different sub-components of the [REDACTED] as satisfying the
27 “determining” and “instantiating” claim limitations (e.g., the [REDACTED],
28 [REDACTED])

1 [REDACTED] for NGFW and [REDACTED] and

2 [REDACTED]

3 Importantly, PAN's expert, Dr. Rubin, does not dispute Dr. Min's opinion that the
 4 determination of the programming language occurs before instantiating a language specific scanner.
 5 PAN cites paragraphs 486, 502, 504, 505, 508 of Dr. Rubin's report to support its attorney argument
 6 that the accused products do not determine any programming language before instantiating the
 7 claimed scanner. Mot. 10. Dr. Rubin does not opine in any of these paragraphs that it is the timing
 8 aspect of the claim limitation that precludes a finding of infringement. *See Ex. C (Rubin Reb. Rpt.)*
 9 ¶ 486 (opining that the determining limitation is not satisfied without mentioning any timing issues
 10 or instantiation by the scanner), ¶ 502 (opining that the instantiating limitation is not satisfied
 11 without mentioning any timing issues or instantiating occurring before the programming language
 12 is determined), ¶ 504 (opining that there is a single scanner but no mention of timing issues with
 13 instantiating the scanner), ¶ 505 (opining that there is a single scanner but no mention of timing
 14 issues with instantiating the scanner), ¶ 508 (opining that there is a single scanner but no mention
 15 of timing issues with instantiating the scanner). Indeed, Dr. Rubin provided opinions that the
 16 accused products do not contain multiple "scanners" for the determined specific programming
 17 language ¶¶ 503-511, 518-522, and that they do not contain "parser rules" or "analyzer rules,"
 18 ¶¶ 512-516, 523-527, but Dr. Rubin provided no opinion that PAN's products do not infringe
 19 because they do not determine a programming language "before" instantiating a scanner.

20 Instead, PAN argues "NGFW does not determine any programming language *before*
 21 instantiating a scanner because Dr. Min admits that the components that he believes determine the
 22 programming language are *part of the alleged scanner.*" Mot. at 9. But this is an oversimplification
 23 of Dr. Min's analysis, because Dr. Min opined and cited evidence (*i.e.*, PAN's documents and source
 24 code) showing programming language specific scanners found in NGFW and WildFire that are
 25 instantiated in response to determining the programming language of the incoming content as
 26 discussed previously.² Even if PAN were correct, one component can perform multiple limitations
 27 of a claim. *See, e.g., Powell v. Home Depot U.S.A., Inc.*, 663 F.3d 1221, 1231-32 (Fed. Cir. 2011)

28

² PAN makes the same argument for WildFire.

1 (“[T]he specification teaches that the cutting box may also function as a ‘dust collection structure’
 2 to collect sawdust and wood chips generated during the wood cutting process. It does not suggest
 3 that the claim terms require separate structures.”). Nothing precludes the claimed “scanner” from
 4 both determining a programming language and subsequently instantiating or enabling a sub-
 5 component of the claimed “scanner” in response to that determination. As discussed before, the
 6 specification expressly discloses embodiments where a scanner “adapts itself dynamically” based
 7 on the programming language of the received content through the use of rule files within the
 8 scanner—*i.e.*, it determines a programming language and subsequently instantiates a scanner:

9 ***An ARB scanner is able to adapt itself dynamically to scan a specific type of***
 10 ***content***, such as inter alia JavaScript, VBScript, URI, URL and HTML. . . . ARB
 11 scanners are data-driven, and can be enabled to scan any specific type of content
 by providing appropriate rule files, without the need to modify source code.

12 Dkt. 112-6 ('408 Patent) at 1:66-2:6 (emphasis added).

13 ***An ARB scanner system is preferably designed as a generic architecture that is***
 14 ***language-independent, and is customized for a specific language through use of***
 15 ***a set of language-specific rules.*** Thus, a scanner system is customized for
 JavaScript by means of a set of JavaScript rules, and is customized for HTML by
 means of a set of HTML rules. ***In this way, each set of rules acts as an adaptor, to***
 adapt the scanner system to a specific language.

16
 17 *Id.* at 6:14-24 (emphasis added); *see also id.* at 15:31-32 (“ARB scanner factory
 18 module 630 instantiates a scanner repository 640.”); *see also id.* at Figs. 6-7 (depicting an ARB
 19 scanner with sub-modules for scanning HTML, javascript, and URI content, respectively).

20 As such, the specification explicitly contemplates a single scanner capable of first
 21 determining the programming language of received content and adapting itself to scan the specific
 22 programming language, [REDACTED]

23 [REDACTED]. *See, e.g.*, Ex. A (Min Op. Rpt.) ¶¶ 385-390 (discussing NGFW source code showing
 24 language specific scanners that are instantiated after the programming language of the incoming
 25 content has been determined); ¶¶ 293-299 (discussing source code showing how the NGFWs
 26 determine a programming language in the incoming content using different modules/functions), ¶¶
 27 424-433 (discussing WildFire source code showing language specific scanners that are instantiated
 28 after the programming language of the incoming content has been determined); ¶¶ 306-309, 311-

1 340 (discussing WildFire source code showing how each version of WildFire determines a
2 programming language at different lines in the code). And unlike PAN’s argument, Dr. Min’s
3 analysis is consistent with the specification, which explains that a scanner can have various sub-
4 modules to determine a programming language and instantiate programming language specific
5 scanners as explained above. Thus, PAN’s argument should be rejected.

6 Notwithstanding the above, it is an axiom of patent law that conflicting expert opinions
7 create a genuine issue of material fact that precludes summary judgment. *Metro. Life Ins. Co. v.*
8 *Bancorp Servs., L.L.C.*, 527 F.3d 1330, 1339 (Fed. Cir. 2008) (“The conflict in declarations created
9 a genuine issue of material fact that made summary judgment inappropriate.”). However here, PAN
10 presents no evidence in response to Dr. Min’s **unrebutted** expert testimony. As Finjan is the non-
11 moving party, and the only side to present expert testimony on this issue, the Court cannot grant
12 summary judgment as PAN cannot meet its burden. In the alternative, even if the Court accepts
13 PAN’s attorney argument as constituting evidence—which it is not—surely, then, a genuine issue
14 of material fact exists where patentee’s expert opines that a limitation is met in a certain manner,
15 and the accused infringer’s expert is silent and relies only on attorney argument. To resolve the issue
16 against Finjan where there is, at the very least, a fact issue, would deprive the jury of its core
17 functions, credibility determinations and the weighing of the evidence. See *Anderson v. Liberty*
18 *Lobby, Inc.*, 477 U.S. 242, 255 (1986).

- i. PAN's Arguments re "Instantiating" a Scanner Before Determining a Programming Language Should Be Rejected as Untimely and Waived

PAN’s Motion presents the Court with undisclosed claim construction and non-infringement positions (*i.e.*, the proper meaning of “instantiating” a scanner and that the claims are not satisfied because the programming language is not determined before the language specific scanner is instantiated), raised for the first time now during summary judgment, which effectively seek an eleventh-hour claim construction on the eve of trial. PAN’s belated attempt at construing terms that were not selected by the parties for construction during the claim construction process runs afoul of both the local patent rules and established case law in this district. PAN therefore “waived any argument with respect to [the disputed] term[s] by failing to raise it during the claim construction

1 phase.” *Cent. Admixture Pharm. Servs., Inc. v. Advanced Cardiac Sols., P.C.*, 482 F.3d 1347, 1356
 2 (Fed. Cir. 2007); *see also Taction Techs., Inc. v. Apple Inc.*, No. 21-CV-812-TWR-JLB, 2023 WL
 3 5184977, at *11 (S.D. Cal. Aug. 11, 2023) (“Sound practical reasons counsel against construing
 4 terms based on claim construction argument raised for the first time in summary judgment briefs or
 5 expert reports.”). Thus, the Court should reject PAN’s new arguments.

6 Indeed, courts in this district have routinely held that a district court is under no obligation
 7 to hear and rule on claim construction arguments presented for the first time in summary judgment
 8 briefs. *See, e.g., Apple, Inc. v. Samsung Elecs. Co., Ltd.*, No. 12-CV-00630-LHK, 2014 WL 252045,
 9 at *4 (N.D. Cal. Jan. 21, 2014); *Asetek*, 2022 WL 21306656, at *11; *Fujifilm Corp. v. Motorola*
 10 *Mobility LLC*, No. 12-CV-03587-WHO, 2015 WL 757575, at *6 (N.D. Cal. Feb. 20, 2015). The
 11 “Federal Circuit has held that it can be error to engage in hypertechnical refinements of the meaning
 12 of claims following claim construction to support a grant of summary judgment.” *Apple, Inc. v.*
 13 *Samsung Elecs. Co., Ltd.*, No. 12-CV-00630-LHK, 2014 WL 252045, at *4 (N.D. Cal. Jan. 21,
 14 2014) (citing *AFG Industries, Inc. v. Cardinal IG Co.*, 375 F.3d 1367 (Fed. Cir. 2004)).
 15 Consequentially, the Court’s consideration of PAN’s belated attempt at claim construction would
 16 be “at the risk of taking factual issues away from the jury.” *Apple*, 2014 WL 252045, at *4. Thus,
 17 PAN’s arguments should be rejected.

18 To the extent the Court is inclined to consider PAN’s belated claim construction argument,
 19 it should do so only as “part of the infringement analysis.” *Id.* at *4–5. At most, courts at this stage
 20 should simply determine whether a jury, “free to rely on the plain and ordinary meaning of the
 21 term,” may conclude that the accused devices infringe. *Id.* at *5 (citing *ePlus, Inc. v. Lawson*
 22 *Software, Inc.*, 700 F.3d 509, 520 (Fed. Cir. 2012)). A reasonable juror could conclude that the
 23 accused devices infringe based on the plain and ordinary meaning of the at issue limitation/term,
 24 thus, summary judgment should be denied. *See supra* Section II.A.2.

25 **3. WildFire Determines Programming Languages**

26 PAN’s Motion is premised on the false claim that Dr. Min testified WildFire does not
 27 determine a programming language and only determines [REDACTED]. Dr. Min never offered such
 28 testimony. Rather, he testified that WildFire, using the same process as NGFW (which PAN is not

1 challenging on this limitation) identifies the embedded programming language and using [REDACTED]
 2 [REDACTED] the process to determine the programming language. Ex. B (Min Dep. Tr. Vol. II)
 3 at 595:6-24. This testimony is consistent with his analysis, which shows WildFire determines the
 4 programming language of an incoming stream (the example below shows how WildFire determines
 5 that Java is the programming language):
 [REDACTED]

6
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 11 Ex. A (Min Op. Rpt.) ¶ 310; *see also id.* ¶¶ 306-309, 311-340 (discussing how each version of
 12 WildFire determines a programming language); ¶¶ 301-305 (discussing WildFire documentation).

13 As Dr. Min's analysis in his report and testimony demonstrate, determining [REDACTED] is only
 14 a portion of the process for determining the programming language. While PAN's expert disagrees
 15 with Dr. Min's opinions that using [REDACTED] as part of the process to determine a programming
 16 language (*e.g.*, javascript, java, PDF, etc.) in WildFire satisfies the claim limitation, that is a question
 17 of fact for the jury to decide. *Optivus Tech., Inc. v. Ion Beam Applications S.A.*, 469 F.3d 978, 985
 18 (Fed. Cir. 2006) ("Infringement, whether literal or under the doctrine of equivalents, is a question
 19 of fact."); *see also Tevra*, 2024 WL 1909156, at *10. Thus, PAN's argument should be rejected.

20 **B. A Genuine Dispute of Material Fact Exists as to Whether PAN's Accused**
 21 **Products Infringe Claim 14 of the '633 Patent**

22 PAN previously acknowledged that what constitutes a "user device" in the accused products
 23 is a question that would be decided based on expert testimony—*i.e.*, a factual inquiry and *not* a legal
 24 one. During the *Markman* hearing, Finjan expressed concern about adding "user device" to the
 25 construction of "downloadable-information destination." Finjan explained this addition could
 26 confuse the jury, as it might cause them to rely on their own lay understanding of "user device,"
 27 limiting it to common end-user devices like cell phones, laptops, and tablets:

28 MR. SMITH: So I'm going to start by pointing out something that was said
 somewhat in passing but I think is very telling to what Finjan thinks is the juror

1 confusion point that we wanted to point to here.

2 Counsel said *end user device, implying a – or what a layperson, a juror*
might interpret to be a phone, a laptop, an iPad, and that's what their
understanding of user device is. So that's not what is claimed in claim 14.

3 Dkt. 289 (*Markman* Hr'g Tr.) at 41:25-42:7 (emphasis added); *see also id.* at 37:9-13 (MR.
 4 MOONEY: The difference, Your Honor, is the device on which this process resides. And as Judge
 5 Freeman found, the specification is clear that it resides on a user device . . . An *end user device.*")
 6 (emphasis added). PAN downplayed this concern, arguing that juror confusion was unlikely and
 7 assured the Court that any ambiguity over the meaning of "user device" would be clarified by expert
 8 testimony at trial:

9 MR. MOONEY: . . . On the jury confusion point, we don't believe there will be
 10 any confusion over user device. We don't believe that jurors are going to believe
 11 that iPhones are the only user devices. *But of course there will be technical experts*
that are going to testify to assist the jury in that regard.

12 *Id.* at 45:20-24 (emphasis added). Thus, rather than address the legal bounds of the term "user
 13 device," PAN argues that question was appropriate for experts—meaning it was factual in nature.

14 After convincing the Court to include "user device" in the claim construction under the
 15 pretense that expert testimony would clarify the term, PAN now seeks summary judgment of
 16 noninfringement based solely on the parties' competing expert opinions concerning "user device."
 17 Mot. at 14-17. PAN has no excuse, as expert discovery—including expert reports and depositions—
 18 was completed in March 2023, more than 14 months before the *Markman* hearing. PAN was fully
 19 aware of Dr. Keromytis's infringement opinions regarding "user device" when it assured the Court
 20 that expert testimony would address any potential confusion.

21 The Court should deny PAN's Motion as to the '633 Patent for this reason alone. But even
 22 on the merits, PAN has not demonstrated the absence of disputed facts.

23 1. **PAN Misinterprets the Court's Ruling on the Construction of**
"Downloadable-Information Destination" and Meaning of
"User Device"

24 The Court's Claim Construction Order does not support PAN's assertion that the Court
 25 rejected Finjan's position or Dr. Keromytis's opinion on the scope of "user device" as used in the
 26 '633 Patent. *Compare* Mot. at 14 *with* Dkt. 290 at 10-11. As PAN admitted during the *Markman*
 27 hearing, that issue was left to the experts. Dkt. 289 (*Markman* Hr'g Tr.) ("We don't believe that
 28 Finjan's Opp. to PAN's Mot. for Summary Judgment

1 jurors are going to believe that iPhones are the only user devices. But of course there will be
 2 technical experts that are going to testify to assist the jury in that regard.). Indeed, the Court noted
 3 that while Finjan raised concerns about potential juror confusion, Finjan did not argue that including
 4 “user device” created an unsupported limitation. Dkt. 290 at 11 (“Although Finjan complains
 5 including a reference to ‘user device’ is potentially confusing, it does not contend it creates an
 6 unsupported limitation or is otherwise incorrect.”).

7 To the extent the Court’s Order addressed this issue, however, it in fact resolved it in favor
 8 of Finjan’s position, not PAN’s. During claim construction, PAN advanced the construction adopted
 9 in *Cisco*. *Id.* at 10-11 (“PAN’s construction, identical to that adopted in *Cisco*, will be utilized
 10 here.”). The *Cisco* court, however, found that a “user device” in the context of the ’633 Patent
 11 included devices such as firewalls or servers:

12 ***More importantly, the specification explicitly equates “information-destination”***
 13 ***with “user device,”*** and describes that a “user device” can include “one or more
 14 devices or processes (such as email, browser or other clients) that are capable of
 15 receiving and initiating or otherwise hosting a mobile code execution.” *Id.* at 7:58–
62. In addition, the specification discloses that [“a “user device” can operate as
a firewall/server.” *Id.* at 7:50. The Court thus finds that Cisco’s reading of the
 16 specification is too narrow.

17 *Finjan, Inc. v. Cisco Sys., Inc.*, No. 17-CV-00072-BLF, 2018 WL 3537142, at *20 (N.D. Cal.
 18 July 23, 2018) (J. Freeman) (internal marks and citations omitted) (emphasis added). Cisco’s
 19 argument that the “downloadable-information destination” must be the “final destination of a
 20 downloadable”³—or in other words, an ‘end user device’—was found unpersuasive, as it relied on
 21 only one embodiment:

22 ***Cisco contends that the “information-destination of the downloadable-***
information” must be the final destination of a downloadable on the grounds that
 23 the specification describes that an unexecutable Downloadable is sent to the client
 24 that originally requested the downloadable. ***The Court finds this argument***
unpersuasive. Even if Cisco’s characterization of the specification is correct
 25 (which the Court does not decide), the portions cited by Cisco pertain only to one
 26 embodiment disclosed in the ’633 patent. On the other hand, as Finjan asserts, the
 specification contains other disclosures that support Finjan’s proposal. For
 example, the specification describes that mobile protection code can be sent to

27 ³ Cisco’s proposed construction for “downloadable-information destination” was “client(s) that
 28 originally requested, and is the final destination for, the downloadable-information.” While Finjan
 proposed adopting the *Proofpoint* construction (*i.e.*, “a device or process that is capable of receiving
 and initiating or otherwise hosting a mobile code execution.”). *Cisco*, 2018 WL 3537142, at *18.

multiple destinations. See '633 patent at 10:11–15.

Id. at *20 (internal marks and citations omitted) (emphasis added). Thus, the *Cisco* court construed “downloadable-information destination” as “user device that includes one or more devices or processes that are capable of receiving and initiating or otherwise hosting a mobile code execution.” *Id.* Here, the Court did not take issue with any of the *Cisco* court’s reasoning and adopted its construction without modification. Dkt. 290 at 10-11.

PAN's assertion (at 16) that Dr. Keromytis's understanding of "user device" in the context of the '633 Patent was "rejected by the Court" is wrong. Dr. Keromytis, relying on much of the same portion of the specification as the *Cisco* court, opines that the '633 Patent describes a "user device" as "a receiving device or process" and may operate as a "firewall" or "server":

The term “user device” as used in the ’633 Patent is quite broad. For example, the patent describes a “user device” as “*a receiving device or process*” (’633 Patent at 3:51-62), and that “*a user device [may] operat[e] as a firewall/server*” (’633 Patent at 7:47-54).

Ex. D (Keromytis Op. Rpt.) at ¶ 381, n. 87 (emphasis added); *see also* Ex. E (Keromytis Dep. Tr. Vol. 1) at 138:9-20 (opining that the patent defines “user device” as “a device or process for receiving information”). The Court did not define “user device” beyond that it must “include[] one or more devices or processes that are capable of receiving and initiating or otherwise hosting a mobile code execution” in accordance with the Court’s construction of “downloadable-information destination.” *See generally* Dkt. 290 at 10-11.

The Court did not address the parties' competing proposals to clarify the scope of "user device." To the extent the Court rejected Finjan's proposed clarification, it also rejected PAN's proposal that it should be limited to "*an end user device*":

Alternative Clarifications

"[a] suitable information-destination or 'user device' can further include one or more devices or processes (such as email, browser, or other clients) that are capable of receiving and initiating or otherwise hosting a mobile code execution" (633 Patent at 7:58-61)

"an end user device that includes one or more devices or processes that are capable of receiving and initiating or otherwise hosting a mobile code execution"

1 Ex. F (PAN’s *Markman* Demonstratives) at 12 (emphasis in original); *see also* Dkt. 289 (*Markman*
 2 Hr’g Tr.) at 41:19-21 (“[T]here are ways to clarify the term without reading out ‘user device.’ A
 3 couple of those appear on slide 12.”). Presumably, the Court relied on PAN’s assurance that expert
 4 testimony would resolve any potential juror confusion on this issue, as discussed earlier.

5 Importantly, PAN does not dispute that a “user device” in the context of the ’633 Patent can
 6 be a firewall or server. *See, e.g.*, Dkt. 289 (*Markman* Hr’g Tr.) at 45:13-16 (“MR. MOONEY: . . . I
 7 heard over and over here that a user device can be a firewall, a user device can be a server. **No**
 8 **dispute.**”) (emphasis added).

9 Therefore, the Court should deny PAN’s Motion, as it is based entirely on a misinterpretation
 10 of the Court’s Claim Construction Order.

11 **2. A Genuine Dispute of Material Fact Exists as to Whether PAN’s**
 12 **WildFire Is a “Downloadable-Information Destination” Under the**
 Court’s Construction

13 PAN’s argument (at 15-17) that Dr. Keromytis has not provided any opinion that WildFire
 14 is a “user device” consistent with the Court’s construction is incorrect. Dr. Keromytis does in fact
 15 opine that WildFire is a “downloadable-information destination” under the Court’s construction—
 16 *i.e.*, “user device that includes one or more devices or processes that are capable of receiving and
 17 initiating or otherwise hosting a mobile code execution.”

18 Dr. Keromytis defines the relevant accused products as WildFire Cloud Basic, WildFire
 19 Cloud Subscription, and WildFire Appliance (WF-500) (collectively, “WildFire Accused Products”
 20 or “WildFire”). Ex. D (Keromytis Op. Rpt.) at ¶¶ 94, 156-166, 169, 180. He specifically opines that
 21 WildFire infringes limitation 14[c], including the “downloadable-information destination” element:

22 Claim limitation 14[c] recites “causing mobile protection code to be executed by
 23 the mobile code executor at **a downloadable-information destination** such that one
 24 or more operations of the executable code at the destination, if attempted, will be
 25 processed by the mobile protection code.” **The Accused Products, including i)**
 WildFire alone, ii) NGFW in combination with WildFire, and iii) Traps in
 combination with WildFire, meet this claim limitation.

26 *Id.* at ¶ 376 (emphasis added). Further, Dr. Keromytis opines that WildFire infringes limitation 14[c]
 27 under PAN’s proposed construction for “downloadable-information destination,” which the Court
 28 adopted:

I understand the parties dispute how the Court should construe the term “downloadable-information destination.” I further understand Finjan’s proposed construction for this term is “a device or process that is capable of receiving and initiating or otherwise hosting a mobile code execution.” *I further understand PAN’s proposed construction for this term is “user device that includes one or more devices or processes that are capable of receiving and initiating or otherwise hosting a mobile code execution.”* As I explain below, i) WildFire alone, ii) NGFW in combination with WildFire, and iii) Traps in combination with WildFire each *satisfy both parties’ proposed constructions for this term.*

Id. at ¶ 379 (emphasis added).

Moreover, Dr. Keromytis explicitly opines that WildFire is a downloadable-information destination” because it is a “user device,” as that term is used in the ’633 Patent, that “includes one or more devices or processes that are capable of receiving and initiating or otherwise hosting a mobile code execution”:

As explained in greater detail below, *WildFire is a downloadable-information destination because it is a device—a user device⁸⁷ or otherwise—that includes one or more devices or processes that are capable of receiving and initiating or otherwise hosting a mobile code execution.* See, e.g., PAN_FIN00000623 at 634 (“WildFire executes the suspect files it receives in a virtual environment and observes the behavior for signs of malicious activities....”).

Id. at ¶ 381 (emphasis added); *see also* Ex. E (Keromytis Dep. Tr. Vol. 1) at 284:16-285:11 (opining that WildFire Cloud and WF-500 each meet the “downloadable-information destination” element). PAN’s attempt to create ambiguity using the word “otherwise” from the above excerpt fails, as it overlooks Dr. Keromytis’s clear opinion that WildFire is, at minimum, a “user device.” Ex. D (Keromytis Op. Rpt.) at ¶ 381.

Additionally, contrary to PAN’s claim (at 15), Dr. Keromytis expressly identifies “WildFire servers” as the “downloadable-information destination,” which the Court construed to mean “a user device that includes one or more devices or processes that are capable of receiving and initiating or otherwise hosting a mobile code execution”:

[T]he Wildfire VM and the analyzers comprise a mobile code executor that causes mobile protection code to be executed at *downloadable-information destination (Wildfire servers)* such that one or more operations of the executable code at the destination, if attempted, will be processed by the mobile protection code.

Id. at ¶ 433 (emphasis added); *id.* at ¶ 444 (same).

In contrast, Dr. Rubin opines that WildFire is not a “user device.” For WildFire Cloud, PAN

1 relies on Dr. Rubin's opinion that "*WildFire virtual machines* are implemented as a cloud-based
 2 solution, and *are not devices which provide direct user interaction, let alone being client endpoint*
 3 *devices.*" Dkt. 306 at 16 (quoting Dkt. 306-4 (Rubin Op. Rpt.) at ¶ 718) (emphasis added). Similarly,
 4 for the WF-500, PAN relies on Dr. Rubin's opinion that "*WildFire Appliance is a private cloud*
 5 *appliance, which is a dedicated device separate from a user device/client device* which implements
 6 the WildFire cloud." Dkt. 306 at 16-17 (quoting Dkt. 306-4 (Rubin Op. Rpt.) at ¶ 719) (emphasis
 7 added). However, as previously discussed, the *Cisco* court expressly rejected this narrow reading,
 8 and this Court did not limit "user device" to devices that provide direct user interaction, client
 9 endpoint devices, or client devices. Dkt. 290 at 10-11.

10 In summary, Dr. Keromytis and Dr. Rubin provide opposing opinions on whether WildFire
 11 is a "user device." As this represents a genuine dispute of material fact, the Court should deny PAN's
 12 Motion as to the '633 Patent and allow the parties' experts to present their opinions to the jury, as
 13 PAN previously assured the Court would occur.

14 **C. A Genuine Dispute of Material Fact Exists as to Whether PAN's Accused
 Products Infringe the Asserted Claims of the '731 Patent**

15 PAN's argument boils down to its expert's disagreement with Finjan's expert, Dr. Markus
 16 Jakobsson, about what constitutes temporary storage and security profiles. PAN argues "security
 17 profile cache" should be construed as the Court construed "file cache" with focus on the term
 18 "cache" but PAN did not propose the term "cache" be construed despite having the opportunity to
 19 do so. PAN also ignores that the Court already rejected its contention that temporary storage must
 20 represent a particular time-period. In its Claim Construction Order, the Court agreed with Finjan's
 21 argument that "'temporarily' should not be seen as implying any particular time period," noting that
 22 "[n]othing in this construction order is to the contrary." Dkt. 290 at 6-7. Even if "security profile
 23 cache" were to be construed as PAN belatedly proposes, record evidence demonstrates that the
 24 "security profile cache" in PAN's accused products satisfies PAN's proposed construction.
 25 Moreover, PAN ignores what Dr. Jakobsson identifies as a "security profile cache" in NGFW or in
 26 WildFire, nor does PAN address Dr. Jakobsson's analysis of those accused features. As such,
 27 summary judgment is not appropriate here, as there is evidence showing satisfaction of the claim
 28 limitation under the plain meaning and PAN's proposed construction. *See U.S. Water Services, Inc.*

1 *v. Novozymes A/S*, 843 F.3d 1345, 1351–52 (Fed. Cir. 2016) (explaining that where “record evidence
 2 demonstrates that there is sufficient evidence favoring the nonmoving party for a jury to return a
 3 verdict for that party, . . . summary judgment [is] inappropriate.”) (internal quotation and citation
 4 omitted); *AFG Industries, Inc. v. Cardinal IG Co., Inc.*, 375 F.3d 1367, 1371 (Fed. Cir. 2004) (“[A]
 5 trial court cannot reach a conclusive finding of noninfringement if the record shows some evidence
 6 supporting a finding of noninfringement and some evidence to the contrary.”).

7 **1. Fact Disputes Exist Regarding Whether the Accused Products
 8 Temporarily Store Scan Results**

9 **i. The Evidence Shows WildFire Stores Scan Results Temporarily**

10 PAN’s Motion must be denied because PAN’s own documents demonstrate that the
 11 features in WildFire accused of infringement temporarily store scan results. Dr. Jakobsson opines
 12 that the [REDACTED] serves as the “security profile cache” because it saves the scan results (*i.e.*,
 13 security profiles) in the [REDACTED] temporarily:

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 Ex. G (Jakobsson Op. Rpt.) ¶ 825 (quoting and citing PAN_FIN00008333 at 337) (emphasis added).

20 PAN apparently disputes this storage is temporary, but its own documents state otherwise:

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 Ex. H (PAN_FIN00008333) at 337 (highlighting added).

27 PAN criticizes the thoroughness of Dr. Jakobsson’s opinions, but the weighing of evidence
 28 is not appropriate for summary judgment. Moreover, Dr. Jakobsson provides detailed analysis

1 supported by record evidence that [REDACTED] serves as a security profile cache, which PAN fails to
 2 address. For example, using PAN's technical documentation as corroborating evidence, he opines
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]

6 [REDACTED] Ex. G (Jakobsson Op. Rpt.) ¶ 828 (citing PAN_FIN00008329 at 329-330). This
 7 is not a one-off document. He cites additional documentation to show how [REDACTED] temporarily
 8 stored scan results:

9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]

18 Ex. G (Jakobsson Op. Rpt.) ¶ 826 (citing PAN_FIN00008325 at 327); *see also id.* at ¶ 820.

19 PAN fails to address Dr. Jakobsson's opinions and this evidence he cited in his report
 20 regarding [REDACTED] in its Motion and should not be allowed to address it with new arguments in
 21 its reply. Indeed, PAN is estopped from raising any new arguments in its reply brief to remedy its
 22 failure to address such technical documentation in its original Motion. *See, e.g., Coleman v.*
 23 *Quaker Oats Co.*, 232 F.3d 1271, 1289 n. 4 (9th Cir. 2000) ("[I]ssues cannot be raised for the first
 24 time in a reply brief."); *Avendano-Ruiz v. City of Sebastopol*, No. 15-CV-03371-RS, 2016 WL
 25 3017534, at *9 (N.D. Cal. May 26, 2016) ("Parties may not raise new arguments in reply briefs,
 26 and consideration of such arguments is improper."); *Cal. Sportfishing Prot. All. v. Pac. States*
 27 *Indus., Inc.*, No. 15-CV-1482, 2015 WL 5569073, at *2 (N.D. Cal. Sept. 22, 2015) ("Raising new
 28 arguments in a reply brief is classic sandbagging . . ."); *Kolker v. VNUS Med. Techs.*, No. 10-CV-

1 00900-SBA, 2012 WL 161266, at *6 (N.D. Cal. Jan. 17, 2012) (“It is improper for a moving party
 2 to introduce in a reply brief new facts or different legal arguments than those presented in the
 3 moving papers.”). PAN’s failure to address its own documentation and Dr. Jakobsson’s opinions
 4 is misleading as it ignores plainly relevant evidence of infringement, but also dooms its Motion.

5 PAN argues its expert opined [REDACTED] cannot serve as the claimed security profile cache
 6 because it stores files before they have been transmitted to WildFire for analysis. Mot. at 20.
 7 Contrary to PAN’s assertion, PAN’s expert does not rebut Dr. Jakobsson’s analysis of the [REDACTED]
 8 serving as the security profile cache. Instead, PAN’s expert’s opinion pertains to the “file cache”
 9 limitation as is shown by the full opinion in the paragraph cited by PAN. *See* Ex. C (Rubin Op. Rpt.)
 10 ¶ 338 (distinguishing the [REDACTED] from the “file cache”). As such, Dr. Jakobsson’s opinion, as
 11 supported by PAN’s own technical documentation, demonstrates PAN cannot meet its burden as the
 12 movant. *See U.S. Water Services, Inc. v. Novozymes A/S*, 843 F.3d 1345, 1351–52 (Fed. Cir. 2016)
 13 (explaining that where “record evidence demonstrates that there is sufficient evidence favoring the
 14 nonmoving party for a jury to return a verdict for that party, . . . summary judgment [is]
 15 inappropriate.”) (internal citation omitted). Thus, summary judgment is not warranted.

16 ii. **PAN’s Remaining Arguments Regarding “Temporary” Storage**
 17 **Highlight the Material Dispute of Fact**

18 PAN’s arguments regarding databases, such as [REDACTED]
 19 [REDACTED] fare no better as each simply highlight questions of fact. Dr. Jakobsson explained multiple
 20 times that “[REDACTED]
 21 [REDACTED].” *See, e.g.*, Ex. G (Jakobsson Op. Rpt.) ¶ 748. PAN’s expert simply
 22 disagrees. *See, e.g.*, Mot. at 20 [REDACTED]
 23 [REDACTED] (citing its expert’s opinion).

24 Indeed, each of PAN’s arguments at their core are that its expert does not agree with Finjan’s expert
 25 and the evidence relied upon to support Finjan’s expert’s opinion, which are quintessential disputes
 26 of fact. *Nalco Co. v. Turner Designs, Inc.*, 73 F. Supp. 3d 1096, 1099–100 (N.D. Cal. 2014) (denying
 27 motion for summary judgment based on disputes of fact “evidenced by dueling expert testimony”).
 28 For example, Dr. Jakobsson opined that the [REDACTED] serves as the security profile cache

1 because it stores scan results (*i.e.*, security profiles) and cited PAN's documentation in support of
2 his opinion:

3 [REDACTED]

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15 Ex. G (Jakobsson Op. Rpt.) ¶ 810 (citing PAN_FIN00010230 at 244) (highlighting added).

16 [REDACTED]

17

18 *Id.* ¶ 811. PAN's expert disagrees. Mot. at 19-20.

19 As another example, Finjan's expert opined that the [REDACTED] serves as the security profile
20 cache because it stores scan results (*i.e.*, security profiles) and explained how it is synced with the
21 [REDACTED] with citations to PAN's documentation to support his opinions:

22 [REDACTED]

23

24

25

26 Ex. G (Jakobsson Op. Rpt.) ¶ 812 (emphasis added); *see also id.* ¶ 827 (citing PAN_FIN00008325
27 at 328) (stating “[REDACTED]
28 ”).

1 [REDACTED]
 2
 3 *Id.* ¶ 828 (citing Ex. I PAN_FIN00008329 at 329) (depicting “[REDACTED”])
 4 [REDACTED]). PAN’s expert disagrees. *See, e.g.*, Mot. at 20 (“[REDACTED”]).
 5 [REDACTED”]).

6 Yet another example, Dr. Jakobsson explained how the source code for NGFW and WildFire
 7 shows the security profile is stored after a scan is complete:
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]

11 Ex. G (Jakobsson Op. Rpt.) ¶ 837 (discussing NGFW source code for the security profile cache).
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]

21 *Id.* ¶ 837 (discussing WildFire source code for the security profile cache) (emphasis added). PAN’s
 22 expert simply disagrees. Ex. C (Rubin Reb. Rpt.) ¶¶ 356, 364. A jury, however, should be allowed
 23 to make credibility determinations and weigh the evidence. *Dynetix Design Sols. Inc. v. Synopsys*
 24 *Inc.*, No. 11-CV-05973-PSG, 2013 WL 1345718, at *3 (N.D. Cal. Apr. 2, 2013) (“This is a classic
 25 ‘battle of the experts’ on a material issue of fact. It is the jury’s province to resolve such issues, not
 26 the court’s.”); *see also NetFuel, Inc. v. Cisco Sys. Inc.*, 438 F. Supp. 3d 1031, 1038–39 (N.D. Cal.
 27 2020) (“Their disputes amount to a “battle of the experts” over material facts, precluding summary
 28 judgment.”). Thus, PAN’s motion should be denied.

1 **2. Factual Disputes Exist as to Whether AV Signatures Satisfy the Claims**

2 Contrary to PAN’s representations to the Court, the experts *do not* agree. PAN relies on
 3 cherry-picked portions from Dr. Jakobsson’s deposition and ignores opinions offered by Dr.
 4 Jakobsson in his report. With the proper context, this is yet another example of PAN’s expert simply
 5 disagreeing with Finjan’s expert, a classic “battle-of-the-experts” situation which precludes
 6 summary judgment.

7 Dr. Jakobsson did not testify that infringing [REDACTED]
 8 [REDACTED], and are not “security profiles” as PAN incorrectly asserts. Rather, the cited
 9 testimony pertained to questions about the signatures in general, not the infringing AV Signatures.
 10 See Mot. at 20-21 (citing Dr. Jakobsson deposition testimony regarding “[t]ypical signatures”). The
 11 question for this Court is not whether “typical signatures” infringe, but whether the specific accused
 12 AV Signatures infringe. On that question, Dr. Jakobsson never disavowed his opinion on AV
 13 signatures, nor did he say that AV signatures are not security profiles. And in his report,
 14 Dr. Jakobsson identifies various PAN technical documents which explain how “AV Signatures”
 15 [REDACTED]:

16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 Ex. G (Jakobsson Op. Rpt.) at ¶ 640 (emphasis added); *see also id.* at ¶¶ 821-824.

20 PAN’s reliance on its own expert, Dr. Rubin, is further unavailing and simply illustrates the
 21 underlying factual disputes the jury must resolve, *e.g.*, whether AV Signatures comprise a list of
 22 computer commands. For these reasons, summary judgment is not appropriate.

23 **3. Dr. Jakobsson’s DOE Opinions Preclude Summary Judgment**

24 PAN is incorrect that Dr. Jakobsson’s opinions are “untenable as a matter of law” because
 25 Dr. Jakobsson does not point to “non-temporary” storage as “temporary” storage as PAN claims.
 26 As explained above in Section II.C.1, PAN has ignored its own technical documentation which
 27 shows that it utilizes temporary storage (*e.g.*, through the use of [REDACTED]). PAN’s failure to account
 28 for this technical documentation dooms its arguments with respect to DOE.

1 Nor is Dr. Rubin's testimony un-rebutted as PAN claims. Dr. Jakobsson described in detail
 2 throughout his report how PAN's accused products include temporary storage, e.g., [REDACTED]
 3 [REDACTED]. See, e.g., Ex. G (Jakobsson Op. Rpt.) at ¶¶ 861-864, see also id. ¶¶
 4 748, 775, 825. PAN's expert responded by disagreeing with Dr. Jakobsson's analysis. Ex. C (Rubin
 5 Reb. Rpt.) ¶¶ 438-442. In reality, this is yet another case of dueling experts as evidenced by
 6 Dr. Jakobsson's DOE analysis which PAN itself cites. See Mot. at 21. The jury should be free to
 7 evaluate both experts' testimony and make credibility evaluations as necessary to properly resolve
 8 whether PAN infringes under the doctrine of equivalents.

9 Because “[i]nfringement under the doctrine of equivalents is an issue of fact,” PAN’s
 10 argument should fail. See *Engel Indus. v. Lockformer Co.*, 96 F.3d 1398, 1406 (Fed. Cir. 1996); see
 11 also *Optivus Tech., Inc. v. Ion Beam Applications S.A.*, 469 F.3d 978, 985 (Fed. Cir. 2006).

12 **D. Pre-Suit Willful Infringement**

13 Finjan will not pursue a pre-suit willful infringement theory at trial. To the extent PAN
 14 argues that Finjan choosing to not oppose this summary judgment argument is improper such
 15 allegations lack merit. Despite not being required by the Local Rules, Finjan identified each of its
 16 *Daubert* and summary judgment arguments to PAN and offered to meet and confer before
 17 submission of summary judgment and *Daubert* motions to avoid burdening the Court, but PAN
 18 declined Finjan’s offer to meet and confer and did not identify any of its arguments.

19 **III. CONCLUSION**

20 For the reasons set forth above, the Court should deny PAN’s Motion for Summary
 21 Judgment.

23 Dated: October 2, 2024

Respectfully Submitted,

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